No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a state law authorizing the forfeiture of a vehicle used on a regular basis to transport heroin, as part of the owner's narcotics trafficking activities, is forbidden by the Fourteenth Amendment to the United States Constitution.

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INTEREST OF THE AMICI CURIAE

Amici are not-for-profit organizations whose mission is to advance the interests of local governments and the public that is dependent on their services.[1]

The National Association of Counties (NACo) represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities is dedicated to helping city leaders build better communities. The League is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amici, its members, or its counsel made a monetary contribution to its preparation or submission.

management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

STATEMENT OF THE CASE

In January 2013, petitioner Tyson Timbs bought a Land Rover LR2 from a dealer in Indianapolis for $42,058.30. Pet. App. 2. "Over the next four months, Timbs regularly drove the Land Rover between Marion and Richmond, Indiana, to buy and transport heroin." *Id.*

In May 2013, an undercover detective purchased heroin from Timbs on two occasions. Pet. App. 2, 14-15. A third undercover purchase was arranged, but on that day Timbs was apprehended during a traffic stop. *Id.* at 2. In June, Timbs was charged with two felony counts of dealing in a controlled substance and one count of felony conspiracy to commit theft. Pet. App. 3. On August 5, the State filed a complaint seeking forfeiture of the Land Rover, naming both Timbs and the vehicle as defendants. *Id.* at 27.

On April 12, 2015, Timbs pled guilty to one count of felony dealing and one count of conspiracy to commit theft, and was sentenced to six years imprisonment, with one year served in community corrections and five years suspended to probation, the payment of $385 in police costs, an interdiction fee of $200, $168 in court costs, a $50 bond fee, and

a fee of $400 for drug and alcohol assessment. Pet. App. 15.

On July 15, after a hearing in the forfeiture case, the trial court found that Timbs "drove the vehicle frequently from Marion to Richmond to purchase heroin" and "to transport heroin back to Marion," and that Timbs "both used and sold heroin." Pet. App. 28. Nevertheless, the court entered judgment in favor of Timbs, finding that forfeiture would violate the Eighth Amendment's prohibition on excessive fines. *Id.* at 29-30.

On appeal, a divided Indiana Court of Appeals affirmed, concluding that "[f]orfeiture of the Land Rover, which was worth approximately four times the maximum permissible statutory fine, was grossly disproportionate to the gravity of Timbs's offense." Pet. App. 24. The Indiana Supreme Court, however, reversed that judgment, holding that "[a]bsent a definitive holding from the Supreme Court, we decline to subject Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution." *Id.* at 9.

SUMMARY OF THE ARGUMENT

Timbs argues that the Eighth Amendment's prohibition on excessive fines is applicable to the States by virtue of the Fourteenth Amendment, which Timbs and some of his amici claim incorporates the first eight Amendments. In terms of the original meaning of the Fourteenth Amendment, this view is dubious. The historical evidence that the Fourteenth Amendment was originally understood to incorporate the first eight Amendments is deeply unsatisfactory. It provides no

basis for the Court to depart from its settled test for assessing claims of incorporation.

Under that test, the forfeiture at issue did not exceed constitutional bounds. Forfeiture of property used to facilitate a serious crime has never been regarded as constitutionally excessive, much less the type of affront to fundamental rights that runs afoul of the Fourteenth Amendment. Instead, forfeiture of this character advances legitimate governmental interests.

ARGUMENT

Under this Court's precedents, a right enumerated in the first eight Amendments to the Constitution is enforceable against the States if it is "incorporated in the concept of due process" because "the right in question is fundamental to *our* scheme of ordered liberty, or . . . is 'deeply rooted in this Nation's history and tradition,'" *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

Timbs and some of his amici, however, reject this test, and contend that the Fourteenth Amendment is properly understood to incorporate all rights enumerated in the first eight Amendments. *See* Pet. Br. 37-40; CAC Br. 14-20; NAACP Br. 12-16. This view was embraced by Justice Thomas in *McDonald*. *See* 561 U.S. at 838-50 (concurring in part and concurring in the judgment). We address that contention in Part I below. In Part II, we explain that forfeiture of Timbs's Land Rover offended neither the Eighth Amendment nor any fundamental right secured by the Fourteenth Amendment.

I. THE FOURTEENTH AMENDMENT DOES NOT INCORPORATE THE FIRST EIGHT AMENDMENTS.

Timbs argues that the Fourteenth Amendment incorporates "at minimum, the individual rights protected in the first eight Amendments." Pet. Br. 40.

In pertinent part, the Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend, XIV, § 1.

When interpreting constitutional text, this Court has written:

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931) (brackets in original and citations omitted)). Thus, ascertaining the meaning of constitutional text requires "examination of a variety of legal and other sources to determine the *public understanding* . . . ." *Id.* at 605.

Focusing on the framing-era public's understanding of constitutional text is critical since it is, after all, the public, through its elected representatives, that ratifies text as part of the Constitution. Thus, as the author of the *Heller* opinion wrote: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended." Antonin Scalia, *Common Law Courts in a Civil-Law System*, *in* A Matter of Interpretation: Federal Courts and the Law 3, 38 (Amy Gutmann ed., 1997).

Inquiry into the founding generation's understanding of the Fourteenth Amendment produces, at best, deeply mixed evidence. For that reason, the Court should reject Timbs's invitation to depart from its traditional approach to determine whether a given right is enforceable against the States under the Fourteenth Amendment.

A. The Evidence of the Original Meaning of the Fourteenth Amendment Is in Conflict.

The discussion that follows reviews the Fourteenth Amendment's original public meaning in terms of its text, drafting and ratification history, post-ratification history, judicial interpretations, and framing-era legal commentary. The evidence is, at best, in deep conflict.

1. Text – The Fourteenth Amendment's protection for "due process of law" is an odd textual formulation for rendering the rights in the first eight Amendments enforceable against the States. As Justice Frankfurter wrote: "It would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and

inexplicit way." *Adamson v. California*, 332 U.S. 46, 63 (1948) (concurring opinion). Moreover, the Fifth Amendment also has a Due Process Clause, and "[i]t ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth." *Id.* at 66. In *McDonald*, Justice Thomas agreed, and instead focused on "what 'ordinary citizens' at the time of ratification would have understood the Privileges or Immunities Clause to mean." 561 U.S. at 811 (concurring in part and concurring in the judgment).

Protecting the "Privileges or Immunities of citizens of the United States," however, is also an odd way of making the first eight Amendments enforceable against the states. At the time the Fourteenth Amendment was crafted, citizens had no "Privileges or Immunities" enabling them to use the first eight Amendments to attack state laws. Instead, this Court had held that the first eight Amendments did not limit the authority of the States:

> The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states . . . . [T]he limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 247

(1833).

Barron produced the prevailing understanding of the "Privileges or Immunities" conferred by the first eight Amendments at the time of the Fourteenth Amendment's ratification. The leading framing-era treatises, for example, explained that *Barron* had settled that the first eight Amendments had no application to the States. *See, e.g.*, Thomas W. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 19 (1868) (Da Capo Press 1972); 1 James W. Kent, Commentaries on American Law 456 (O.W. Holmes rev. 1873).

Thus, when the Fourteenth Amendment was crafted, the privileges or immunities of citizenship included no privilege or immunity to attack state laws as inconsistent with the first eight Amendments. Indeed, not long after the Fourteenth Amendment's ratification, this Court took just this view in *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), holding that the Privileges or Immunities Clause prohibited state interference with only those rights that inhered in the citizen's relationship with the federal government, such as the rights to engage in interstate travel, to use navigable waters, to the protection of treaties, and to petition the federal government for redress of grievances. *Id.* at 96-111.

To be sure, some members of the Congress that drafted the Fourteenth Amendment entertained a different understanding. For example, Senator Jacob Howard, as he introduced what would become the Fourteenth Amendment on the floor of the Senate, stated that the privileges and immunities of citizens included "the personal rights guaranteed and

secured by the first eight amendments to the Constitution . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

Similarly, Rep. John Bingham, in debate over an earlier proposal that would have granted Congress "power to enact all laws which shall be necessary and proper to assure to the citizens of each State all privileges and immunities of citizens in the several States," CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866), stated that the proposal would permit enforcement of the first eight Amendments against the States. *See, e.g., id.* at 1034, 1088, 1089, 1090.[2]

While no other Member of Congress was quite that explicit, some stated that the proposal would facilitate enforcement of the existing provisions of the Constitution against the states.[3]

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[2] During the debate over the final version, Bingham was not as expansive, but mentioned in passing that the proposed amendment would authorize a remedy against "cruel and unusual punishments" in violation of the Eighth Amendment. *Id.* at 2542.

[3] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 586 (1866) (proposed amendment "provides in effect that Congress shall have power to enforce by appropriate legislation all the guarantees of the Constitution") (Rep. Donnelly), 1054 (proposal would "give vitality and life to portions of the Constitution that probably were intended from the beginning to have life and vitality") (Rep. Higby), 1057 (proposal protected rights "already to be found in the Constitution) (Rep. Kelley), 1066 (proposal would protect "freedom of speech from state suppression") (Rep. Price), 1088 (proposal protected "those privileges and immunities which are guaranteed . . . under the Constitution") (Rep. Woodbridge), 1263 (characterizing "the right of speech" "the writ of habeas corpus, and the right of petition" as "the rights and immunities of citizens") (Rep. Broomall), 1294 (referring to proposal as a "bill of rights") (Rep. Wilson), 2459 (proposal's protections "all are asserted, in some

Given *Barron*, it is fair to ask how Bingham, Howard, and others could have thought that the "privileges or immunities" formulation could have secured the first eight Amendments against the States. The answer, it turns out, is that they had an unconventional view of the privileges and immunities of citizenship. There was a school of thought that understood *Barron* to mean only that the federal government lacked power to enforce the first eight Amendments against the States, while still believing that they nevertheless limited the power of the States. In the debate over the admission of Oregon to the Union, for example, Bingham denied "that the States are not limited by the Constitution of the United States, in respect of the personal or political rights of citizens of the United States," adding that "whenever the Constitution guarantees its citizens a right, either natural or conventional, such guarantee is itself a limitation upon the States." CONG. GLOBE, 35th Cong., 2d Sess. 982 (1859).

As incorporation advocate Michael Kent Curtis has demonstrated, Bingham was part of a school that believed that the first eight Amendments applied to the States even prior to the Fourteenth Amendment. *See* Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 37-41, 49-54, 59-91, 112 (1986) [hereinafter "No State Shall Abridge"]. *Accord, e.g.*, Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 181-87 (1998). Professor Curtis acknowledged, however, that this view did not

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form or another, in our . . . organic law") (Rep. Stevens), 2961 (proposal would enable enforcement of "all the provisions of the Constitution") (Sen. Poland) (1866).

represent an accurate account of the existing privileges and immunities of citizenship: "[S]uch claims were made even though the Supreme Court had ruled in 1833 [in *Barron*] that the guarantees of the federal Bill of Rights did not impose limits on the states." Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges and Immunities of Citizens of the United States*, 78 N.C. L. Rev. 1071, 1010-11 (2000) (footnote omitted) [hereinafter Curtis, *Inkblots*]. *Accord, e.g.*, Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 Ohio St. L.J. 1509, 1543 (2007) ("the *Barron* contrarian view was and remains unorthodox and incorrect").

Thus, the views of these "*Barron* contrarians" are not likely an accurate gauge of how most would have understood the "privileges or immunities" of national citizenship in the framing era.

To be sure, as Justice Thomas observed in *McDonald*: "At the time of Reconstruction, the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.'" 561 U.S. at 813. *Accord, e.g.*, Curtis, *Inkblots*, *supra* at 1094-1136. Under *Barron*, however, citizens had no right to attack state laws as inconsistent with the first eight Amendments. While the Fourteenth Amendment secured the privileges and immunities of national citizenship as rights against the States, those privileges and immunities did not include a right to use the first eight Amendments against the States. Thus, it is far from clear that the public would have understood the Fourteenth Amendment to embrace an unorthodox and incorrect account of the privileges and immunities of citizenship.

Indeed, constitutional text addressed to the privileges and immunities of citizenship was not new; the original Constitution provided that the citizens of each state were entitled to "all privileges and immunities of citizens of the several states," U.S. Const. art. IV, § 2, cl. 1.[4] The leading treatises of the era explained that this Article IV Privileges and Immunities Clause prohibited States from discriminating against citizens of other States with respect to state and common-law rights thought to be fundamental, without any reference to the first eight Amendments. *See* Cooley, *supra*, at 15-16; 2 Kent, *supra*, at 84-85; George W. Paschal, The Constitution of the United States: Defined and Carefully Annotated 226 (1868); 2 Joseph Story, Commentaries on the Constitution of the United States § 1806 at 582 & n.4 (1832) (Melville M. Bigelow rev. 1891). And, only months after the ratification of the Fourteenth Amendment, *see* Proclamation No. 13, 15 Stat. 708, 710 (July 28, 1868), this Court construed the Article IV Clause as a nondiscrimination obligation with respect to state-law rights. *See Paul v. Virginia*, 75 U.S. (6 Wall.) 168, 179-83 (1868).

Accordingly, some eminent scholars have argued that the Fourteenth Amendment's Privileges or Immunities Clause was understood to merely extend the nondiscrimination obligation of Article IV by prohibiting States from discriminating against

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[4] This formulation was close enough to the Fourteenth Amendment's that both Bingham and Howard referenced the Article IV provision as providing insight into the current proposal. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1089, 2542 (1866) (Rep. Bingham); *id.* at 2765 (Sen. Howard) (1866). To similar effect, *see id.* at 1054 (Rep. Higby), 1057 (Rep. Kelley).

classes of their own citizens with respect to state-law rights considered fundamental, with the Equal Protection Clause affording a right to nondiscriminatory protection from private lawbreakers. *See, e.g.*, David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888, at 342-51 (1985); John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 Yale L.J. 1385, 1397-432 (1992).

Considering this welter of conflicting evidence, it should be unsurprising that after Sen. Howard's speech, other senators denied that there was any settled meaning of "privileges or immunities." *See* CONG. GLOBE, 39th Cong., 1st Sess. 3039 (1866) (Sen. Hendricks), 3041 (Sen. Johnson). In the House, similarly, Rep. Boyer argued that section one was "open to ambiguity and admitting of conflicting constructions." *Id.* at 2467.

Thus, it is far from clear that the public understood that the original meaning of the Fourteenth Amendment's text made the first eight Amendments applicable to the States.

2. Drafting History – As we explain above, some members of the Congress that drafted the Fourteenth Amendment expressed an incorporationist understanding of its text. Others, however, understood it as an antidiscrimination provision, a view supported by the prevailing understanding of the Article IV Privileges and Immunities Clause.

During the debate on Bingham's original proposal, for example, Thaddeus Stevens stated that the proposal "provide[d] that, where any State makes a distinction in the law between different

classes of individuals, Congress shall have the power to correct such discrimination and inequality . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866). With respect to the final version, Stevens observed: "This amendment . . . allows Congress to correct the unjust legislation of the states, so far that the law which operates upon one man shall operate equally upon all." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).[5]

Similarly, Senator Luke Poland thought that the proposed Amendment "secures nothing beyond what was intended" by Article IV's Privileges and Immunities Clause, CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866). Senator Garrett Davis likewise referred to the Privileges or Immunities Clause as tracking its Article IV analogue. *Id.* at App. 240.

References to antidiscrimination as the meaning of the Fourteenth Amendment were hardly isolated. The single most frequently expressed understanding of the proposed amendment was that it constitutionalized the Civil Rights Act of 1866.[6] The Civil Rights Act, however, was an antidiscrimination provision that did not purport to

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[5] For a useful discussion of the dynamics of the drafting process and Stevens' important role, see Earl M. Maltz, Civil Rights, the Constitution, and Congress, 1863-1869, at 79-92 (1990).

[6] *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866) (Rep. Garfield); *id.* at 2465 (Rep. Thayer); *id.* at 2467 (Rep. Boyer); *id.* at 2468 (Rep. Kelley); *id.* at 2498 (Rep. Broomall); *id.* at 2501 (Rep. Raymond); *id.* at 2501 (Rep. Raymond); *id.* at 2509 (Rep. Spaulding), *id.* at 2511 (Rep. Eliot); *id.* at 2534 (Rep. Eckley); *id.* at 2538 (Rep. Rogers); *id.* at 2539 (Rep. Farnsworth); *id.* at 2549 (Rep. Stevens); *id.* at 2883 (Rep. Latham); *id.* at 2961 (Sen. Poland); *id.* at 3031 (Sen. Henderson); *id.* at 3069 (Rep. Van Aernam).

render the first eight Amendments applicable to the States. *See* Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866). Indeed, "[t]he legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *Georgia v. Rachel*, 384 U.S. 780, 791 (1965). On incorporation, the evidence from the congressional debates is, at best, in conflict.

3. Ratification – If Congress had conveyed to the public that the proposed Fourteenth Amendment repudiated the conception of the privileges and immunities of citizenship found in *Barron* and Article IV, one would expect an indication to that effect in the ratification debates in the States. There is, however, little evidence along these lines.

The threshold problem is that the evidence of the ratifiers' understanding is itself unsatisfactory. As Professor Curtis explained, "[m]ost of the state legislatures that considered the Fourteenth Amendment either kept no record of their debates, or their discussion was so perfunctory that it sheds little light on their understanding of its meaning. Messages by governors are available, but most are quite general . . . ." Curtis, No State Shall Abridge, *supra* at 145.[7] Another incorporation advocate,

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[7] To similar effect, see James E. Bond, No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment 8-9 (1997). For a summary of the rather generic discussions during ratification, see Curtis, *supra*, at 131-54. Even Bingham spoke in generic platitudes during ratification, leading one historian to speculate that the framers were on the defensive during the ratification process and limited their claims about the impact of the proposed

Bryan Wildenthal, admitted that "the evidence from the ratification process seems vague and scattered when it comes to any strong public awareness of nationalizing the entire Bill of Rights." Wildenthal, *supra*, at 1601.

Likely the most thorough study is James Bond's analysis of the debates surrounding ratification in Illinois, Ohio, and Pennsylvania, where the weight of the evidence indicates that proposed amendment was understood to embody the Civil Rights Act, with virtually no discussion of the effect of the Fourteenth Amendment on the first eight Amendments. *See* James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435, 445-54 (1985). His study of the ratification debate in the former confederate states similarly found little evidence of an incorporationist understanding, although he unearthed considerable evidence that the amendment was understood as an antidiscrimination rule.[8]

To be sure, as Justice Thomas observed, much of Sen. Howard's key speech was reprinted in major newspapers. *See McDonald*, 561 U.S. at 832-33. Critically, however, none of these accounts made any special mention of incorporation of the first eight Amendments. *See, e.g.*, Wildenthal, *supra*, at

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amendment. *See* Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America 173-75 (2000).

[8] *See* Bond, *supra* note 7, at 10, 19-24, 45, 56-58, 80-81, 86-90, 103-07, 111. 123-24, 127-28, 148-50, 173-77, 180-82, 199, 215-17, 220-23, 234-38, 241-42, 252-55. See also James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 Wake Forest L. Rev. 89, 112-16 (1984).

1564. And, as Professor Wildenthal acknowledged, although the *New York Times* gave "prominent front-page coverage to Congress's final passage and submission of the Amendment to the States . . . there was no mention of incorporation." *Id.* at 1595. George Thomas's survey demonstrated that there were, at most, a tiny handful of newspaper articles that could have drawn the public's attention to a potential for incorporation. *See* George C. Thomas, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. Contemp. Leg. Issues 323, 347-59 (2009).

At best, some incorporation advocates have pointed to evidence that during congressional campaign of 1866, some advocates called for ratification of the Fourteenth Amendment to protect the constitutional rights of citizens against the States. *See* Kurt T. Lash, The Fourteenth Amendment and the Privileges and Immunities of American Citizenship 204-21 (2014); Curtis, *Inkblots*, *supra*, at 1134-36. Such appeals, however, could have been understood in terms of securing the constitutional right to be free from discrimination with respect to fundamental rights. In any event, the lack of evidence that the Fourteenth Amendment was understood to incorporate the first eight Amendments in the ensuing ratification debates in the States leaves the matter in considerable doubt.

4. Post-Ratification History – If the public had understood that the Fourteenth Amendment placed the States under an obligation to bring their laws into conformity with the first eight Amendments, one might expect some movement along those lines in the wake of ratification. Yet, nothing like that

happened.

As Professor Fairman's comprehensive survey demonstrated, at the time of ratification, there were numerous inconsistencies between the laws of the ratifying states – even outside the South – and the first eight Amendments, and ratification produced no movement to bring those laws into conformity with the first eight Amendments. *See* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5, 84-123 (1949). There were similar flaws in the constitutions of the many of the southern states later readmitted to Congress, even though Congress approved each readmitted state's constitution and required each to be in conformity with the United States Constitution, including the new Fourteenth Amendment. *See id.* at 126-32 (observing that in 1868, Congress approved the admission of Florida, South Carolina, Louisiana, and in 1870, Congress approved admission of Virginia and Texas, despite their constitutions' inconsistency with the Fifth Amendment's Grand Jury Clause, and in 1868, Congress approved admission of Georgia despite its constitution's limitations on jury rights under the Sixth and Seventh Amendments).

Moreover, the Fourteenth Amendment's ratification did nothing to halt the reform movement that, advancing the view that the grand jury was an undesirable anachronism, led a number of States, in the wake of the Fourteenth Amendment's ratification, to nevertheless permit prosecution by information, despite the Fifth Amendment's Grand Jury Clause. *See* Donald A. Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First)*

Criminal Procedure Revolution, 18 J. Contemp. Leg. Issues 469, 478-90 (2009). Indeed, in the wake of ratification, five states modified their grand jury requirements in ways inconsistent with the Fifth Amendment's Grand Jury Clause. *See* George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 Ohio St. L.J. 1627, 1654-55 (2007). This is not what one would expect had there been a general understanding that upon the Fourteenth Amendment's ratification, the first eight Amendments had become binding on the states.

5. Judicial Interpretations in the Wake of Ratification – If an incorportionist understanding of the privileges and immunities of citizenship inconsistent with the antebellum regime of *Barron* had emerged in the process of framing and ratifying the Fourteenth Amendment, one might expect to some evidence of that understanding in the judicial decisions that followed ratification. The evidence of such an understanding, however, is quite thin.

Months after ratification of the Fourteenth Amendment, this Court unanimously rejected a claim that a state indictment was inconsistent with the Fifth and Sixth Amendments, citing *Barron* and its progeny as controlling. *See Twitchell v. Pennsylvania*. 74 U.S. (7 Wall.) 321, 325-26 (1868). Akhil Amar, a leading incorporationist, attributes this to Twitchell's counsel, who made no argument based on the newly-minted Fourteenth Amendment. *See* Amar, *supra*, at 206-07. Still, if the process of ratification had produced a widespread understanding that the Fourteenth Amendment had overturned *Barron*, one might expect the Court to at least note

that much, and rest its decision on Twitchell's failure to press the point.[9]

The Court's first explicit discussion of the meaning of the Fourteenth Amendment's Privileges or Immunities Clause came *Slaughter-House*, in which, as we explain above, the Court described the privileges and immunities of citizenship in terms of the rights citizens held with respect to the federal government. *Slaughter-House* provides a good indication that it was, at best, unclear in the framing era that the Privileges or Immunities Clause was understood in incorporationist terms.[10]

Incorporation was squarely at issue in *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532 (1874), in which the Court considered an argument that a state statute abridged a privilege and immunity of citizenship by denying the Seventh Amendment's right to trial by jury in civil cases. *Id.* at 544. Without dissent, and citing *Barron*, the Court wrote that the Seventh

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[9] Similarly, in *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (13 Wall.) 169 (1871), the Court again acted as if *Barron* remained good law, rejecting an effort to apply the Fifth Amendment's prohibition on uncompensated taking of private property on the ground that "though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States." *Id.* at 176-77.

[10] In dissent, Justice Bradley, joined by Justice Swayne, understood the privileges and immunities of citizenship to include all fundamental rights, including those in the first eight Amendments, 83 U.S. (16 Wall.) at 112-19, but Justice Field's dissent characterized the new Privileges or Immunities clause as a nondiscrimination obligation, *id.* at 96-101. Thus, only two Justices understood the Privileges or Immunities Clause to accomplish incorporation.

Amendment "does not apply to trials in the State courts." *Id.* at 557 (footnote omitted).

United States v. Cruikshank, 92 U.S. (2 Otto) 542 (1875), involved the sufficiency of an indictment brought under the Enforcement Act of 1870, which prohibited conspiracies to "hinder . . . free exercise of any right or privilege . . . secured by the constitution or laws of the United States. *Id.* at 548 (quoting Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 141 (1870)). The Court rejected counts alleging that the defendants deprived the victims of their First Amendment rights, citing, among other cases, *Barron*, *Twitchell*, and *Edwards*, *id.* at 552, and followed *Slaughter-House* in treating as protected only "[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the power or duties of the national government . . . ." *Id. Cruikshank*, moreover, called non-discrimination the animating principle of the Fourteenth Amendment: "The equality of the rights of citizens is a principle of republicanism . . . . The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more." *Id.* at 555.

The following year, the Court again rejected, unanimously, application of the Seventh Amendment to the states. *See Walker v. Sauvinet*, 92 U.S. (2 Otto) 90, 92-93 (1875).

In sum, "[i]f there had been a public understanding that the Fourteenth Amendment had accomplished incorporation, it is surely strange that the Supreme Court's framing-era opinions contain so little evidence of that understanding." Lawrence

Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. Contemp. Leg. Issues 361, 394 (2009).[11]

6. Framing-Era Commentary – A review of the leading scholarly commentaries of the framing era provides, at best, conflicting evidence that the original meaning of the Fourteenth Amendment was incorporationist.

Perhaps the leading scholarly work on constitutional law of the framing era was Thomas Cooley's treatise, which this Court, in *Heller*, characterized as "massively popular." 554 U.S. at 616. The first edition of the treatise to appear after ratification stated that it was "doubtful" whether the Privileges or Immunities Clause "surround the citizen with any protections additional to those before possessed under the State Constitutions . . . but a principle of State constitutional law has now been made part of the Constitution of the United States." Thomas Cooley, A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States *294 (2d ed. 1871). This statement, while no model of clarity, suggests that the Fourteenth Amendment merely forbade states from discriminating with respect to rights protected by state law.

In any event, Cooley was quite clear in his 1873

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[11] There was a published framing-era lower court decision that embraced incorporation, *see United States v. Hall*, 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871) (No. 15,282), but two other decisions published at about the same time rejected incorporation. *See United States v. Crosby*, 25 F. Cas. 701, 704 (C.C.C.S.C. Ala. 1871) (No. 14,893); *Rowan v. State*, 30 Wis. 129, 148-50 (1872).

revision of Justice Story's treatise on constitutional law. The revision unambiguously defined the Privileges or Immunities Clause as an antidiscrimination provision. *See* 2 Joseph Story, Commentaries on the Constitution of the United States §§ 1934-37 (4th ed. Thomas L. Cooley rev. 1873). The next year, Cooley published a new edition of his own treatise, and cited the previous year's revision of Story on the character of the Fourteenth Amendment's Privileges or Immunities Clause. *See* Thomas Cooley, A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States * 12, *573 n.3 (3d ed. 1874).

The question of incorporation was also addressed in the June 18, 1874 issue of the *Central Law Journal*, which, citing *Barron*, stated that the Second Amendment had no application to the states. *See The Right to Keep and Bear Arms for Public and Private Defense (Part 3)*, 1 Cent. L. J. 295 (John F. Dillon ed., 1874). The *Review* was edited by John Forrest Dillon, "one of the most accomplished legal figures in America." Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 Stan. L. & Pol'y Rev. 571, 593 (2006).

Similarly, new editions of the leading criminal law treatises of the day appeared in the wake of the Fourteenth Amendment, written by Joel Prentiss Bishop and Francis Wharton, and both failed to discern any applicability of the first eight Amendments to the states, describing these Amendments as restrictions on only the federal government. *See* 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure §§

99, 145, 891-92, 946, 981 (5th ed. 1872); 1 Francis Wharton, A Treatise on the Criminal Law of the United States: Principles, Pleading and Evidence §§ 213, 573 (7th ed. 1874); 3 *id.* § 3405.

To be sure, the evidence is mixed. For example, Timothy Farrar, in the third edition of his treatise, published in 1872, after noting *Barron* and it progeny, added, without elaboration, that these precedents "are entirely swept away by the 14th Amendment." Timothy Farrar, Manual of the Constitution of the United States 546 (3d ed. 1872). Farrar, however, is something of an unreliable narrator. In his first edition, Farrar claimed that under the antebellum Constitution, the Bill of Rights applied to the States, *See* Timothy Farrar, Manual of the Constitution of the United States 58-59, 395-97 (1867). As we explain above, this view that was quite wrong as a matter of contemporary public meaning.[12]

John Norton Pomeroy's 1868 treatise, written when the proposed Fourteenth Amendment was before the States, acknowledged that the States

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[12] In his 1868 treatise, George Paschal wrote that the rights secured by the Fourteenth Amendment "ha[ve] already been guarantied in the second and fourth sections of the fourth article, and in the thirteen amendments. The new feature is that the general principles . . . are thus imposed on the States." Paschal, *supra*, at 290. Paschal, however is also something of an unreliable source; his scholarship was sloppy. No one involved in framing or ratification thought that the Fourteenth Amendment incorporated the Ninth, Tenth, Eleventh, or Twelfth Amendments; the Tenth and Eleventh Amendments expressly limit federal and not state power, and the Twelfth Amendment involves only the manner by which the President and Vice-President are elected. *See* U.S. Const. amend. IX-XII.

were not bound by the first eight Amendments yet vigorously criticized that state of affairs. *See* John Norton Pomeroy, An Introduction to the Constitutional Law of the United States §§ 232-36 (1868). Pomeroy then added:

> [A] remedy is easy, and the question of its adoption is before the people . . . . When the Constitution has from the beginning contained prohibitions upon the power of the states to pass bills of attainder, ex post facto laws, or laws impairing the obligation of contracts, it is strange that a provision forbidding acts which deprive a person of life, liberty, or property, without due process of law, was not also inserted at the outset; it is more than strange that any objections can be urged against the proposal now to remedy the defect.

Id. at § 237 at 151. It is unclear whether Pomeroy's "remedy" is incorporation or merely extending the guarantee of due process to the states. Moreover, Pomeroy's 1875 edition described constitutionally protected "privileges or immunities" without reference to the first eight Amendments:

> All the rights which inhere in national citizenship as such, are fully protected against hostile state legislation. The negative clauses of the XIVth Amendment, executing themselves in the same manner as the clauses forbidding *ex post facto* laws and the like, invalidate every state statute which is opposed to their inhibitions. The rights thus protected are all civil in their nature, and not political, and embrace the fundamental capacities and right to pass through the States at will, to enter and dwell in

> any one at will, to acquire, hold, and transmit personal and real property, to enter into contracts, to engage in and pursue all lawful trades and avocations, to obtain redress in the courts, and to be equal before the laws. Such civil rights make up the privileges and immunities of citizens of the United States.

John Norton Pomeroy, An Introduction to the Constitutional Law of the United States § 767, at 532 (3d ed. 1875).[13]

At best, the evidence from the commentators is deeply mixed. If the process of framing and ratification had informed the public that the first eight Amendments were to bind the states, it is surely odd that leading figures such as Cooley, Dillon, Bishop and Wharton missed the news.

B. This Court Should Not Depart from Its Incorporation Precedents

As we explain above, this Court has rejected incorporation of the first eight Amendments within the Fourteenth. It has instead asked whether a right is "fundamental to *our* scheme of ordered liberty, or . . . whether it "is 'deeply rooted in this Nation's history and tradition,'" *McDonald*, 561 U.S. at 767 (quoting *Glucksberg*, 521 U.S. at 721).

This Court should not depart from its precedents lightly. After all, "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal

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[13] One might think that Pomeroy's third edition had been influenced by *Slaughter-House*, but his third edition expresaly states that *Slaughter-House* "can hardly be regarded as final in giving a construction of the XIVth Amendment." *Id.* at 530.

principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2008) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). When determining whether to repudiate precedent, this Court considers "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478-79.

As we explain above, the evidence that this Court's precedents have misapprehended the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause is, at best, mixed. Certainly, the evidence does not demonstrate with unmistakable clarity that the Court has erred.

Petitioners and their amici make no argument that the Court's approach to incorporation has also proven unworkable. Nor do petitioners or their amici make any claim that the Court's incorporation precedents are inconsistent with a line of related decisions, or with developments since those precedents were handed down.

Reliance interests, in contrast, counsel strongly against a change of course. For example, more than a century ago, the Court held that the Fifth Amendment's Grand Jury Clause does not apply to the States, and that due process permits States to utilize preliminary hearings at which judges determine whether charges are supported by probable cause. *See Hurtado v. California*, 110 U.S. 516 (1884). Since then, the Court has never repudiated *Hurtado*. *See McDonald*, 561 U.S. at 765

n.13. In reliance on *Hurtado*, 28 States permit felony charges to be brought by information rather than grand jury indictment, and in those States, the vast majority of cases proceed by information. *See* 4 Wayne R. LaFave et al., Criminal Procedure § 15.1(g) (4th ed. 2017).

States have reason to prefer charging by information, with judicial review of charging undertaken at preliminary hearings, to grand-jury indictment. Many criticize the use of grand juries, for example, believing that they are offer little effective check on prosecutorial power. *See id.* § 15.3(a). Even prosecutors have reason prefer charging by information; as one commentator observed: "Even in jurisdictions where grand juries rarely decline to indict, the grand jury requirement still imposes meaningful costs on the prosecutor's office, including the costs related to prosecutor time and grand jury time." Paul T. Crane, *Charging on the Margin*, 57 Wm. & Mary L. Rev. 775, 803 (2016). Incorporating the first eight Amendments against the States would therefore impose substantial costs on states that have developing charging systems in justifiable reliance on *Hurtado*.

Similarly, in reliance on the decisions we discuss above refusing to incorporate the Seventh Amendment civil-jury right against the States, a majority of States narrower right to a civil jury trial than is reflected in this Court's Seventh Amendment jurisprudence. *See, e.g.*, Eric J. Hamilton, Note, *Federalism and State Civil Jury Rights*, 65 Stan. L. Rev. 861 (2013) (discussing approaches to civil jury rights in cases involving intertwined issues). This area of state law would also be disrupted by a regime of total incorporation.

Accordingly, a holding that would compel states to adhere to the first eight Amendments would impose substantial burdens on the States that developed approaches to charging in reasonable reliance on this Court's incorporation precedents. That is reason enough to reject petitioners' argument for total incorporation.

II. FORFEITURE OF TIMBS'S VEHICLE DOES NOT VIOLATE THE CONSTITUTION.

Petitioners attack is framed at a high level of generality; they argue that "the right to be free from excessive fines remains 'fundamental to our scheme of ordered liberty' today." Pet. Br. 35 (quoting *McDonald*, 561 U.S. at 767). Petitioners and their amici, however, have little to say about whether the forfeiture sought in this case offends any fundamental right.

To be sure, in the decision below, the Indiana Supreme Court "decline[d] to subject Indiana to a *federal* test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution." Pet. App. 9. To the extent that this passage suggests that the court believed the United States Constitution places no limitations on the power of States to impose fines, it may well be overbroad. "This Court, however, reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 293, 297 (1956). There is nothing about the forfeiture sought in this case that offends a fundamental right incorporated within the Fourteenth Amendment, or even this Court's Eighth Amendment jurisprudence.

As this Court has observed: "[A] long and

unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put . . . ." *Bennis v. Michigan*, 516 U.S. 442, 446 (1996). *Accord, e.g., United States v. Bajakajian*, 524 U.S. 321, 333 (1998) ("Instrumentalities historically have been treated as a form of 'guilty property' that can be forfeited in civil *in rem* proceedings."); *Bennis*, 516 U.S. at 454 (Thomas, J., concurring) ("[F]orfeiture of property . . . because it was 'used' in or was an 'instrumentality' of crime has been permitted in England and this country, both before and after the adoption of the Fifth and Fourteenth Amendments.").

Moreover, forfeiture of property used by its owner to facilitate unlawful activity advances legitimate governmental interests "both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Bennis*, 516 U.S. at 452 (citation and internal quotations omitted).

The forfeiture sought here fits squarely within this tradition. Indiana law permits the state to forfeit vehicles that are used to transport narcotics if the owner knew or had reason to know that the vehicle was being used unlawfully. Ind. Code §§ 34-24-1-1(a)(1) & 34-24-1-4(a). Under Indiana law, the forfeiture of property utilized to commit a crime is considered a civil action with both punitive and remedial justifications:

> [W]hile punishing and deterring those who have engaged in illegal drug activity, forfeiture simultaneously advances other non-punitive, remedial legislative goals. First, forfeiture creates an economic disincentive to engage in

> future illegal acts. It also serves another significant, albeit secondary, purpose. Forfeiture advances our Legislature's intent to minimize taxation by permitting law enforcement agencies, via the sale of property seized, to defray some of the expense incurred in the battle against drug dealing. It is these broad remedial characteristics which support our Court of Appeals' determination that forfeiture actions are civil in nature.

Katner v. State, 655 N.E.2d 345, 347-48 (Ind. 1995) (citations omitted).

The constitutional authority of states to enforce fines and forfeitures is not without limits. For example, the Fourteenth Amendment's Due Process Clause may well require the judiciary to "police exorbitant applications of the statute," *Bennis*, 516 U.S. at 457 (Ginsburg, J., concurring). The Amendment's Due Process and Equal Protection Clauses, moreover, prohibit incarcerating an individual who is unable to pay a fine. *See Bearden v. Georgia*, 461 U.S. 660, 666-73 (1981). Timbs, however, makes no claim of any extraordinary hardship stemming from the forfeiture sought here.

When it comes to forfeiture under federal law, forfeiture "is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Austin v. United States*, 509 U.S. 602, 622 (1993) (citation and internal quotation omitted). *Austin*'s holding that forfeiture is a "fine" within the meaning of the Eighth Amendment, however, does not mean that forfeiture of a vehicle used by its owner on a regular basis to transport heroin is "excessive" within the meaning of the Eighth Amendment, much less an

infringement of a fundamental right incorporated within the Fourteenth Amendment. Even putting aside the Indiana Supreme Court's expressed willingness to set aside excessive forfeitures as a matter of state constitutional law, the forfeiture sought here is appropriately proportioned, regardless whether Eighth or Fourteenth Amendment standards are applied. Three considerations are critical.

First, forfeiture deprives Timbs of property integral to his unlawful conduct. The Land Rover was hardly peripheral to Timbs's narcotics trafficking; the trial court found that Timbs used it on regular a basis to transport heroin. Timbs does not question the sufficiency of the evidence supporting that finding.

Second, by depriving Timbs of his investment in the Land Rover, forfeiture achieves rough proportionality. It is, of course, difficult for the prosecution to determine the revenues derived from crimes that involve covert economic activities such drug trafficking. The trial court found that Timbs had trafficked heroin on a regular basis, but his unlawful revenues could not be ascertained more precisely. It is, of course, often easy for narcotics traffickers to conceal the proceeds of their unlawful activities. Accordingly, depriving Timbs of his investment in the property that he used to carry out those activities is likely the best the legislature can do to devise a proportioned financial penalty. *Cf. Bajakajian*, 524 U.S. at 336 (rejecting an Eighth Amendment test "requiring strict proportionality between the value of a forfeiture and the gravity of a criminal offense" and instead "adopt[ing] the standard of gross disproportionality").

Third, and perhaps most important, the Land Rover was used to commit a serious offense. States are surely entitled to take heroin trafficking quite seriously. As one assessment recently concluded:

> Heroin-related deaths will continue at high levels in the near term. The heroin available in white powder markets in the United States is very high-purity. Increasing poppy cultivation in Mexico, the primary supplier of U.S. heroin markets, ensures it will remain high-purity. The heroin market is further intertwined with the fentanyl market, with heroin supplies in white powder markets increasingly laced with highly-potent fentanyl. This combination will most likely lead to an increase in opioid deaths in the near term.

DEA, U.S. Dep't of Justice, 2017 National Drug Threat Assessment 55 (Oct. 2017). Those who traffic highly addictive and dangerous substances pose a profound threat to public health and welfare. In additional to imprisonment, the legislature is surely entitled to impose substantial financial penalties, especially when many jurisdictions may lack the financial ability to imprison all engaged in drug trafficking for substantial periods of time.

This forfeiture stands in sharp contrast to *Bajakajian*, the only case in which this Court has found a forfeiture to violate the Eighth Amendment. In that case, the government sought a forfeiture of $357,144 in cash seized from an offender guilty of a "failure to report the removal of currency from the United States," an offense that was "unrelated to any other criminal activities," reflecting what the Court characterized as a "minimal level of

culpability," and in which "[t]he harm . . . caused was also minimal." 524 U.S. at 337, 338.

It would be absurd to compare the technical violation in *Bajakajian* with Timbs's adventures in heroin trafficking. *Cf. Harmelin v. Michigan*, 501 U.S. 957, 1001-05 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (upholding mandatory life sentence for possessing more than 650 grams of cocaine against the claim that it constituted cruel and unusual punishment). This is not a case in which forfeiture works an undue hardship on one guilty of a technical, regulatory offense.

To support their conclusion, the only consideration invoked by the trial court and a divided Indiana Court of Appeals was that the value of the forfeiture exceeds the maximum statutory fine of $10,000. *See* Pet. App. 20-22, 29-30. The maximum fine, however, is in generic statute that provides for a maximum fine for every felony. See Ind. Code §§ 35-50-2-4 to -7. Surely the legislature was entitled to impose an additional financial penalty in cases involving special threats to public health, and to utilize the remedy of forfeiture for property already in the State's custody. Forfeiture, of course, avoids the difficulties in collecting fines from defendants whose assets will frequently be difficult to discover, or who may be unable to pay. *Cf.* ACLU Br. 12-21 (explaining that fines are frequently imposed on impoverished individuals with limited ability to pay).

Accordingly, even if the Eighth Amendment were directly applicable to this state-law forfeiture, nothing about the forfeiture at issue is

constitutionally excessive. For the same reason, it offends no deeply rooted, fundamental right protected by the Fourteenth Amendment.

CONCLUSION

For the preceding reasons, the judgment of the Supreme Court of Indiana should be affirmed.

Respectfully Submitted,

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